

tural farm, the trustees could not possibly come to us to ask us for authority to make the buildings fit for a new lease, or to meet the requirement of an eligible tenant. They would have to exercise their own discretion, as I think they must do here. If in their discretion they think it is in the interests of the estate to let to the Postmaster-General, and in order to obtain him as a tenant to expend money upon the melioration and extension of the property, there again it is entirely a question for their discretion, and they cannot come here to ask us to back them up by saying that their discretion has been exercised wisely—that is a thing that we cannot possibly do. I therefore concur with your Lordship.

**LORD MACKENZIE**—I am of the same opinion. The matters that are dealt with in this petition and in the report by Mr Dalziel are matters of trust administration, and as such cannot be dealt with by the Court, in an appeal to the *nobile officium* of the Court. It is for the trustees to administer in the manner which they think best in the circumstances.

I should only like to add with reference to what has been said, that when the expression "the advantage of the estate" is used the trustees have to consider that there are interests in the estate which may at certain points conflict, because whenever there are liferenters and fiars what is for the benefit of the liferenter may not be for the benefit of the fiar, and *vice versa*. But that is a matter for the trustees, and they must in the whole circumstances of the case act in the best interests of all, holding an even balance between the liferenters and the fiars. I feel justified in this case in saying that I do not see that there is any reason to doubt that the trustees have power to grant a lease for twenty-one years if in the whole circumstances of the case that is the best trust administration; and if it is necessary in order to secure the best offer (and here it is an offer made by the Post Office) that capital expenditure should be made, then they are just in the same position as trustees who are managing agricultural property when a farm lease runs out, who may be at face to face with the questions whether buildings are to be renewed, land to be drained, and so on, and how much money will have to be expended in order to get the present tenant to remain or to get a better offer. All that is pure matter of administration. Accordingly, as I have said, these are matters for the trustees to determine, and with regard to which the Court cannot give advice.

The **LORD PRESIDENT**, who was present at advising, gave no opinion not having heard the case.

The Court dismissed the petition.

Counsel for the Petitioners—Blackburn, K.C.—J. H. Henderson. Agents—Kelly, Paterson, & Co., S.S.C.

Wednesday, July 10.

## FIRST DIVISION.

[Lord Dewar, Ordinary.]

**BOYLE v. OLSEN.**

**THE LINDSEY STEAM FISHING COMPANY, LIMITED v.**

**ACTIESELSKABET BONHEUR.**

*Process—Conjunction—Ship—Common Defender—Pursuers with Hostile Claims—Salvage.*

Where separate actions were raised by two pursuers against a common defender claiming recompense in respect of salvage services averred to have been rendered, *held*, notwithstanding that there was a conflict of interest between the pursuers, that the actions should be conjoined.

*Proof—Conjoined Actions—Pursuers with Hostile Claims—Cross-examination—English Practice.*

Where actions were conjoined in which the pursuers had hostile claims, *held* that, following English practice, the pursuers should have the right to cross-examine each other's witnesses.

*Process—Tender—Conjoined Actions—Pursuers with Hostile Claims—Apportionment between Pursuers—English Practice.*

Where a joint tender was made by a defender in conjoined actions in which the pursuers had hostile claims, *held*, following English practice, that defender must apportion the tender between the rival pursuers.

John S. Boyle, trawl owner, Aberdeen, owner of the steam trawler "Glenogil," pursuer, brought an action in the Sheriff Court at Aberdeen against Fred. Olsen, Christiania, Norway, registered owner of the steamship "Balduin," defender, for £5000 as salvage remuneration, loss, and damage, in respect of salvage services rendered by the "Glenogil" to the "Balduin" in the North Sea on or about 28th and subsequent days of November 1911. The case was remitted to the Court of Session *ob contingentium* on March 9, 1912.

The Lindsey Steam Fishing Company, Limited, Grimsby, owners of the trawler "Lacerta," pursuers, brought an action in the Court of Session against Actieselskabet Bonheur, Christiania, owners of the "Balduin," defenders, for payment of £500 as remuneration for salvage services rendered to the "Balduin," and compensation for loss and damage suffered by the "Lacerta."

In answer to signals of distress shown by the "Balduin," the "Glenogil" came to her rescue, and, after certain manœuvres on the part of both vessels, the "Glenogil's" hawfers were got on board the "Balduin" and made fast, and thereafter the "Glenogil" proceeded to tow her to Aberdeen. Further assistance in the towage was given by the steam trawler "Lacerta," and Boyle, whose claim included a sum for the "Lacerta's" towage, averred that

the "Lacerta" acted on an arrangement with the "Glenogil," and that the services rendered by the "Lacerta" were not of the nature of salvage services but only of towage. The Lindsey Steam Fishing Company, Limited, on the other hand, averred that the "Lacerta's" services were salvage services.

On 21st May 1912 the Lord Ordinary (DEWAR) conjoined the actions. The defenders made joint tender to cover the claims in both actions.

The interlocutor in the action at the instance of the Lindsey Steam Fishing Company, Limited, was in these terms—"The Lord Ordinary closes the record on the summons and defences . . . and continues the cause: Conjoins herewith the action at the instance of John S. Boyle and others against Fred. Olsen in this day's roll: and grants leave to reclaim."

The pursuer Boyle reclaimed, and argued—(1) Conjunction of actions was only allowed in Scots practice where there was identity of parties or subject-matter—*Duke of Buccleuch v. Cowan, &c.*, February 23, 1866, 4 Macph. 475, per Inglis, L.J.-C., at p. 480, 1 S.L.R. 141; November 30, 1876, 4 R. (H.L.) 14, 14 S.L.R. 189. In this case there was not only no identity but conflict between the pursuers. By English procedure "consolidation" was allowed, and parties with conflicting interests were allowed to cross-examine each other's witnesses. But there was no such practice in Scotland. (2) English practice allowed joint tender, but it was followed by apportionment between competing claimants—Roscoe, Admiralty Practice, pp. 328, 329, 370. Joint tender should not be adopted from English law without also adopting the English practice of apportionment. It did not follow that where actions were consolidated joint tender was competent, and it might be competent where actions were not consolidated—"Strathgarry," [1895] P. 264, per Bruce, L.J., at p. 268; "Jacob Landstrom," 1878, 4 P.D. 191; "The Lee," 1889, 6 Aspinall's Maritime Cases, 395. As to apportionment of the tender there was no analogy to be found in the process of multiplepinding, for in this case the fund *in medio* was not fixed. The risks undergone by the two ships were entirely different—"Clifton," 1834, 3 Haggard's Admiralty Reports, 117; "Vulcan v. 'Berlin,'" July 6, 1882, 9 R. 1057, per Lord Deas, at p. 1062, 19 S.L.R. 790.

The above argument was adopted by the owners of the "Lacerta."

The defenders argued—(1) The Court had always conjoined actions where it was convenient and made for economy, and that even where there was a conflict of interest between pursuers—*Wilson v. Rapp*, 1909, 2 S.L.T. 295. "Consolidation" of actions had been found convenient in the English Admiralty Courts. In "*The Gantock Rock*" (June 19, 1900, 2 F. 1060, 37 S.L.R. 804), two salvage actions were conjoined by consent, and the pursuers cross-examined each other's witnesses. (2) The joint tender made should be allowed without apportionment; it was for the pursuers to

determine how it should be divided. What was due for salvage could be determined and then it could be apportioned—Kennedy, Civil Salvage, p. 184.

At advising—

LORD PRESIDENT—In this reclaiming note we were referred to various authorities of English practice. It is quite evident that counsel are not fully aware of what this practice is. It is one of those matters which is not easily found in the books. I have taken the opportunity of conferring on this subject with one of the learned Judges in the Admiralty Division, and I have learned that when actions are so conjoined, or rather consolidated as it is expressed in England, there is always an opportunity for the counsel of one of the sets of plaintiffs to cross-examine the witnesses of the other.

Now I think it is my experience here that if an interlocutor simply conjoins two actions and says nothing more, there is no such right given to counsel for one pursuer to cross-examine the witnesses of the other. I think that this cross-examination should be allowed. I do not see anything in our practice against it, but I think the matter should be dealt with in the interlocutor. Accordingly, I think the Lord Ordinary's interlocutor ought to be affirmed, but with the addition that the counsel for the one pursuer has the right to cross-examine the witnesses of the other.

That is all that is absolutely necessary to decide with regard to this reclaiming note, but as the matter of tender is obviously very much at the root of the question now at issue, and as we have heard argument upon this point, it is as well that I should give the result of my inquiries on this subject also.

I was informed by the learned Judge that whenever he thought the justice of the case required it—and I gathered from him that it was what may be called the ordinary rule rather than the extraordinary—if a defender in such circumstances put in a tender he was then obliged by the judge to apportion the tender amongst the other parties. That really is equivalent to putting in two separate tenders. I mention this because I think it is the course that ought to be followed in this case.

LORD KINNEAR—I concur.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I concur.

The Court adhered to the interlocutor of the Lord Ordinary in the action at the instance of the Lindsey Steam Fishing Company, Limited, against Actieselskabet Bonheur, but varied it by the addition after the word "Roll" of the words "under the declaration that the counsel for the one pursuer shall have the right to cross-examine the witnesses of the other."

Counsel for Pursuer and Reclaimer (Boyle)—Constable, K.C.—Burn Murdoch. Agents—Mackenzie & Kermack, W.S.

Counsel for Pursuers and Reclaimers (The Lindsey Steam Fishing Company, Limited)—A. R. Brown. Agents—Alexander Morison & Co., W.S.

Counsel for Defenders and Respondents—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Wednesday, July 10.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

### SORENSEN v. GAFF & COMPANY.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule I (3)—Amount of Weekly Payment—Benefit during Period of Incapacity—Payment of Hospital Charges.*

The Workmen's Compensation Act 1906, Schedule I (3), enacts—"In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity."

A seaman, injured by accident arising out of and in the course of his employment, received maintenance and medical treatment in a hospital, which was subsequently paid for by the employer on an account rendered by the hospital. In an arbitration under the Workmen's Compensation Act 1906 the arbiter found that the payment in question was a benefit received by the seaman during the period of his incapacity. *Held* that there was evidence before the arbiter on which he could reasonably come to this finding, and that it could not be set aside.

This was an appeal by way of Stated Case from a decision of the Sheriff-Substitute (LYELL) at Glasgow in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between Euliff Sorensen, seaman, West College Street, Glasgow, *appellant*, and John Gaff & Company, steamship owners, Glasgow, *respondents*.

The Case stated—" (1) That the appellant, who was a seaman in the employment of the respondents on board the s.s. 'Shakespeare,' was injured by an accident arising out of and in the course of his employment while the said s.s. was at sea on 26th December 1911. (2) That on said 26th December 1911, on the arrival of the said s.s. in Falmouth Harbour, the appellant entered the Falmouth Cottage Hospital, and was maintained and medically treated there until 16th February 1912. (3) That in respect of such maintenance and treatment the said hospital rendered to the respondents, prior to the raising of the arbitration proceedings, an account for £9, 5s., which the respondents settled in full, subsequent to the raising of the arbitration proceedings, by a payment of £6, 10s. 7d. (4) That the weekly earnings of the appellant averaged at 34s. 6d. (5) That

the respondents paid the appellant compensation at the rate of 17s. 3d., being 50 per cent. of 34s. 6d., from the said 16th February 1912 up to 5th April 1912, at or about which latter date they aver that the appellant's incapacity came to an end.

"The only question upon which the parties desired judgment meantime was as to whether the payment by the respondents of the appellant's maintenance and treatment in Falmouth Cottage Hospital from the date of the accident to his discharge on 16th February was a benefit which the appellant received from the respondents during his incapacity to which regard must be had in fixing the amount of compensation.

"I found in fact and law (1) that the said payment of £6, 10s. 7d. for the appellant's maintenance and treatment in the said hospital was not payment of a debt due by the respondents to the appellant under the Merchant Shipping Act or otherwise; (2) that the said payment was a benefit received by the appellant during the period of his incapacity, and in respect of a period of incapacity covered by the Workmen's Compensation Act 1906, and I found in law (1) that in fixing the amount of the weekly payment regard must be had to the said payment of £6, 10s. 7d.; (2) that the respondents' liability to pay compensation to the appellant should be assessed at one penny per week from 26th December 1911 to 16th February 1912, and at seventeen shillings and threepence per week from 16th February 1912 during the appellant's total incapacity, and with these findings I continued the cause."

The question of law was—"Whether the payment by the respondents of the appellant's maintenance and treatment in Falmouth Cottage Hospital from the date of the injury by accident to his discharge on 16th February 1912, was a benefit received by the appellant from the respondents during the period of his incapacity to which the arbitrator was bound to have regard in fixing the amount of the weekly payment, by virtue of the provisions of paragraph (3) of Schedule I of the Workmen's Compensation Act 1906?"

Argued for the appellant—It was an inference of fact from the Sheriff's findings (1) that appellant went to the hospital of his own accord and not on his master's recommendation; (2) that he was not therefore in receipt of benefit from his master; and (3) that the respondents did not *ex post facto* convert the payment into a benefit. Payment of a debt due by a workman was not a benefit in the sense of the Act—*Suleman v. Owners of the 'Ben Lomond,'* 1909, 2 B.W.C.C. 499; *M'Dermott v. Owners of s.s. 'Tintoretto,'* 1909, 25 T.L.R. 691, 4 B.W.C.C. 123; *Kempson v. Owners of 'Moss Rose,'* 1910, 4 B.W.C.C. 101; *Simmonds v. Stourbridge Glazed Brick and Fireclay Company, Limited,* [1910] 2 K.B. 269.

Counsel for the respondents were not called on.

LORD PRESIDENT—I think this is a plain case. By the third head of the First